Appendix A

Constitutional and Statutory Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitutional and Statutory Provisions Involved

New Jersey Rule 3:5-9

Alibi

(a) Particulars by Defendant. If a defendant is to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney, furnish a written bill of particulars, signed by him, and stating the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Such particulars shall be furnished the prosecuting attorney within 10 days from the service of such demand.

(b) Particulars by Prosecuting Attorney. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand therefor, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) Amendment. The trial court shall have power to order the amendment, amplication or reduction of the particulars mentioned in sections (a) and (b) of this Rule, or of the time of their service, as the ends of justice may require.

(d) Failure to Furnish. If such bill of particulars is not furnished as required, the party in default may be excluded from presenting any evidence at the trial as to defendant's absence

from or presence at, respectively, the scene of the alleged offense, or the court may impose such conditions and grant such adjournment as the ends of justice may require.

Appendix B

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-113 September Term 1967

(Same Title)

Argued March 5, 1968 — Decided April 1, 1968

On appeal from the Somerset County Court, Law Division.

Mr. Michael A. Querques argued the cause for appellant (Mr. Harvey Weissbard and Mr. Daniel E. Isles, of counsel and on the brief; Messrs. Querques and Isles, attorneys).

Mr. S. Philip Klein, Assistant Prosecutor, argued the cause for respondent (Mr. Michael R. Imbriani, Somerset County Prosecutor, attorney).

The opinion of the Court was delivered

PER CURIAM.

Defendant was convicted of violations of N.J.S. 2A:138-1 (carnal abuse) and of a violation of N.J.S. 2A:96-3 (impairment of a minor's morals) involving a 12-year-old girl. We certified his appeal before argument in the Appellate Division.

Defendant challenges the constitutionality of

R.R. 3:5-9[1] which requires a defendant, if he intends to rely upon an alibi, to furnish before trial a bill of particulars of that claim and the names and addresses of the witnesses "upon whom he intends to rely to establish such alibi." Defendant, asserting the rule invaded his privilege against self-incrimination under the Fifth and Fourteenth Amendments, moved to vacate the State's demand for particulars, which motion was

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1. The rule reads:

"(a) Particulars by Defendant. If a defendant is to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney, furnish a written bill of particulars, signed by him, and stating the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Such particulars shall be furnished the prosecuting attorney within 10 days from the service of such demand.

(b) Particulars by Prosecuting Attorney. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand therefor, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) Amendment. The trial court shall have power to order the amendment, amplification or reduction of the particulars mentioned in sections (a) and (b) of this Rule, or of the time of their service, as the ends of justice may require.

(d) Failure to Furnish. If such bill of particulars is not furnished as required, the party in default may be excluded from presenting any evidence at the trial as to defendant's absence from, or presence at, respectively, the scene of the alleged offense, or the court may impose such conditions and grant such adjournment as the ends of justice may require."

denied. Both the Appellate Division and we denied leave to review that order before trial. State v. Angeleri, 48 N.J. 348 (1966). Defendant then complied with the rule, listing six witnesses, but calling only two at the trial. The State made no comment upon his failure to call the remaining witnesses.

Our rule of Court is not designed to compel a defendant to say anything. Rather it requires the specified pretrial disclosure if, but only if, the defendant plans to assert an alibi. As we said in State v. Baldwin, 47 N.J. 379, 388 (1966), cert. denied, 385 U.S. 980, 17 L. ed. 2d 442 (1966):

> "* * * In calling upon a defendant to reveal a claim of that kind before trial, our rule is designed 'to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is recessed to that end.' State v. Garvin, 44 N.J. 268, 272-273 (1965). Our rule replaced a statute, R.S. 2:190-7, adopted in 1934. As the statement annexed to the legislative bill recited, the purpose of that act was 'to do away with the existing unfairness in criminal trials of a surprise alibi * * *.'"

See 6 Wigmore, Evidence (3d ed. 1940) §1855b, pp. 418-420. There is no suggestion that the State sought the pretrial disclosure for any other reason or put it to any other use.

Defendant does not say his alibi, or its pretrial disclosure, did in fact incriminate him. In any event, if an alibi should tend to incriminate an

accused, it must be because of its inherent infirmity. The Constitution does not protect a defendant from the consequences of the defense he makes, nor assure him a right so to defend as to deny the State a chance to check the truth of his position. The cases uniformly reject the constitutional challenge here made. Rider v. Crouse, 357 F.2d 317, 318 (10 Cir. 1966); Jones v. Superior Court of Nevada County, 22 Cal. Rptr. 879, 882, 372 P.2d 919, 922 (Sup. Ct. 1962); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, 219 (Sup. Ct. 1963), cert. denied, 375 U.S. 853, 11 L. ed. 2d 80 (1963); People v. Shulenberg, 279 App. Div. 1115, 112 N.Y.S.2d 374 (3d Dept. 1952); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607, 612-613 (3d Dept. 1940); People v. Schade, 161 N.Y. Misc. 212, 292 N.Y.S. 612 (Cty. Ct. 1936); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656, 657 (Sup. Ct. 1931); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96, 99 (Super. Ct. 1966); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (Sup. Ct. 1952), annotated, 30 A.L.R.2d 480 (1953); 1 Wharton, Criminal Evidence (12th ed. 1955) § 23, p. 75; 2 Underhill, Criminal Evidence (5th ed. 1956) § 440, p. 1110; see State v. Dodd, 101 Ariz. 234, 418 P.2d 571, 574 (Sup. Ct. 1966).

Defendant did not take the stand. He contends that during the trial the prosecutor alluded to defendant's right to testify and then in summation referred to his failure to do so. As to the first, the defense had suggested to the jurors in the voir dire that a certain relationship had existed between the defendant and the child's mother. The prosecutor simply said that whatever the defendant might say in that regard would be irrelevant.

The reference to the defendant's right to testify was incidental to the prosecutor's reaction to a position taken by the defense. As to the summation, the prosecutor apparently intended only to note that a factual assertion made by the defense during the trial had not been backed up by testimony. No objection was made to that remark. In fact defendant himself called attention to his right to testify, his counsel saying in the opening that "It will be his word against hers." At any rate, the trial court charged the jury that no inference should be drawn against defendant because of his failure to testify. We do not doubt the clear capacity of the instruction to dissipate any suggestion to the contrary by the prosecutor. See State v. De Stasio, 49 N.J. 247, 252 (1967), cert. denied, ___ U.S. ___, 19 L. ed. 2d 89 (1967). Nor does it matter that defendant objected to a curative charge. A defendant may not assert that there has been a forbidden comment and simultaneously object to a corrective instruction. To hold otherwise would be to say that an improper comment in this area must lead to a mistrial or a reversal, a proposition which we think would be unrealistic and unwarranted.

We have examined the remaining points and see no need to discuss them.

The judgments are affirmed.

Appendix C
Order of the Supreme Court of New Jersey Staying Mandate

(Filed 5/28/68)

SUPREME COURT OF NEW JERSEY
M-320 September Term 1967

(Same Title)

This matter having been duly presented to the Court, it is Ordered that the motion for a stay is granted upon condition that the petition for certification be filed with the United States Supreme Court within 30 days from this date.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 28th day of May, 1968.

A TRUE COPY
s/ John H. Gildea
CLERK

FILED
May 28, 1968
John H. Gildea
CLERK

Appendix D
Demand for Bill of Particulars as to Alibi

(Filed 6/14/66)

SOMERSET COUNTY COURT
LAW DIVISION

On Indictment, etc. No. 100-65-M

STATE OF NEW JERSEY

v.

NICHOLAS ANGELERI

Defendant.

TO Daniel E. Isles, Esq.
Attorney for Defendant, Nicholas Angeleri
501 Central Avenue
Orange, New Jersey

SIR:

Please take notice that if you intend to rely in any way, at the trial of the above entitled cause, on an alibi, that the County Prosecutor in and for the County of Somerset demands that you furnish, within ten (10) days from the service of this demand upon you, a written bill of particulars, signed by you and stating the specific place or places at which you claim to have been at the time of the offense with which you are charged and the names and addresses of the witnesses upon whom you intend to rely to establish such

Demand for Bill of Particulars as to Alibi

alibi.

Dated: June 6, 1966

s/ Michael R. Imbriani
Michael R. Imbriani
Deputy Attorney General In Charge

Notice of Motion

(Filed 6/27/66)

SOMERSET COUNTY COURT
LAW DIVISION

1965 Term, May Stated Session
Indictment No. 100-65-M

(Same Title)

TO: MICHAEL R. IMBRIANI, ESQ.
Deputy Attorney General In Charge
Office of the County Prosecutor
In and for the County of Somerset
Court House
Somerville, New Jersey

SIR:

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant Nicholas Angeleri shall make application to the Somerset County Court, Law Division at the Somerset County Court House, Somerville, New Jersey, on Friday, July 15, 1966 at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order of the court:

(1) Vacating and setting aside the Demand for Bill of Particulars as to Alibi served upon the Defendant.

(2) Permitting the defendant to testify as to alibi, if the defendant so chooses to, without compliance with the aforesaid Demand for Bill of Particulars as to Alibi.

Notice of Motion

(3) Such other relief as the court may deem just. Upon the grounds that the Demand for Bill of Particulars as to Alibi served upon the defendant violates the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution, compels the attorney for the defendant to disclose his work-product to the State of New Jersey, violates the Canons of Professional Ethics (Canon 37) and that Revised Rule 3:5-9 pursuant to which the Demand for Bill of Particulars as to Alibi, is an unconstitutional invasion of and deprivation of the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution; and

TAKE FURTHER NOTICE that upon the hearing of the said motion the undersigned attorneys for the defendant shall rely upon the brief to be submitted forthwith.

QUERQUES & ISLES
Attorneys for Defendant
NICHOLAS ANGELERI

By s/ Daniel E. Isles
DANIEL E. ISLES

Order Denying Motion to Vacate Bill of Particulars

(Filed 7/21/66)

SOMERSET COUNTY COURT
LAW DIVISION

(Same Title)

The defendant having moved to vacate the State's Demand for Bill of Particulars as to Alibi, and the Court having considered such motion on July 15, 1966, Michael A. Querques appearing for the defendant, and Raymond R. Trombadore, acting as First Assistant Deputy Attorney General, appearing for the State of New Jersey, and the Court having considered the briefs and arguments of the parties, and for the reasons set forth in this Court's separate findings and opinion,

It is on this 20th day of July, 1966, ORDERED that defendant's motion be and the same is hereby denied.

s/ J. Berkeley Leahy
Judge
Somerset County Court

Answer to Demand for Bill of Particulars

(Filed 1/16/67)

SOMERSET COUNTY COURT
LAW DIVISION

(Same Ttile)

TO: MICHAEL R. IMBRIANI, ESQ.
Deputy Attorney General In Charge
Somerset County Prosecutor's Office
Somerset County Courthouse
Somerville, New Jersey

PLEASE TAKE NOTICE that the defendant in the above captioned matter intends at the time of trial to rely on the defense of alibi.

The defendant will establish that on the following days he was at or in the places hereinafter set forth in New Jersey:

March 3, 1966 -

High Oaks Poodles, 161 Interhaven Avenue, North Plainfield, New Jersey

March 24 and March 31, 1966 -
125 Stelle Avenue, Plainfield, New Jersey
April 7, 1966 -

Office trailer on Skyline Drive, Warren Township, New Jersey.

The defendant will rely on the following witness and such others as may be revealed by further investigation.

Answer to Demand for Bill of Particulars

1. Mrs. Nicholas Angeleri, 343 Terrill Road, Scotch Plains, New Jersey

2. - 3. Tess and Al Newman, 161 Interhaven Avenue, North Plainfield, New Jersey

4. Dr. and Mrs. Maurice S. Meyers, 125 Stelle Avenue, Plainfield, New Jersey

5. Mal Rose, 308 So. First Avenue, Highland Park, New Jersey

s/ Michael A. Querques
MICHAEL A. QUERQUES
Attorney for Defendant